



DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 310

[Docket ID: DoD-2022-OS-0142]

RIN 0790-AL62

Privacy Act of 1974; Implementation

AGENCY: Office of the Assistant to the Secretary of Defense for Privacy, Civil Liberties, and Transparency (OATSD(PCLT)), Department of Defense (DoD).

ACTION: Proposed rule.

SUMMARY: The OATSD(PCLT) is giving notice of a proposed rulemaking for an existing component-wide system of records pursuant to the Privacy Act of 1974 titled CIG-16, “Inspector General Administrative Investigation Records,” which was modified and reissued on May 31, 2022. In this rulemaking, the Department proposes to amend the existing rule for CIG-16 in order to exempt portions of this system of records from certain provisions of the Privacy Act because of national security and law enforcement requirements; to avoid interference during the conduct of criminal, civil, or administrative actions or investigations; and to protect the identity of confidential sources incident to Federal employment, military service, contract, and security clearance determinations.

DATES: Send comments on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments, identified by docket number, Regulation Identifier Number (RIN) and title, by any of the following methods.

* Federal eRulemaking Portal: <https://www.regulations.gov>. Follow the instructions for submitting comments.

* Mail: Department of Defense, Office of the Assistant to the Secretary of Defense for Privacy,

Civil Liberties, and Transparency, Regulatory Directorate, 4800 Mark Center Drive, Attn: Mailbox 24, Suite 08D09, Alexandria, VA 22350-1700.

Instructions: All submissions received must include the agency name and docket number or RIN for this *Federal Register* document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the internet at <https://www.regulations.gov> as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: Ms. Rahwa Keleta,
OSD.DPCLTD@mail.mil; (703) 571-0070.

SUPPLEMENTARY INFORMATION:

I. Background

In accordance with the Privacy Act of 1974, the Office of Inspector General (OIG) modified and reissued a system of records titled, “Defense Case Activity Tracking System (D-CATS),” CIG-16, on May 31, 2022 (87 FR 32391). The system of records was retitled, “Inspector General Administrative Investigation Records (IGAIR).” IGAIR is critical to the DoD OIG’s management and oversight of DoD programs and activities and is used for managing cases, storing information, responding to requests for information, and fulfilling mandatory reporting requirements. This system contains records of DoD OIG mission activities such as: the identification, referral, and investigation of DoD Hotline complaints; administrative investigations of both military and civilian senior officials accused of misconduct; oversight and investigation of whistleblower reprisal cases against Service members, DoD contractor employees, and DoD civilian employees (appropriated and non-appropriated fund); and improper command referrals of Service member mental health evaluations.

The system consists of both electronic and paper records and will be used by the OIG to maintain records about individuals who are subject and/or associated with a matter involved in DoD OIG’s oversight of investigations referenced above.

II. Privacy Act Exemption

The Privacy Act allows Federal agencies to exempt eligible records in a system of records from certain provisions of the Act, including those that provide individuals with a right to request access to and amendment of their own records. If an agency intends to exempt a particular system of records, it must first go through the rulemaking process pursuant to 5 U.S.C. 553(b)(1)-(3), (c), and (e). This proposed rule explains why an exemption is being claimed for this system of records and invites public comment, which DoD will consider before the issuance of a final rule implementing the exemption.

The DoD OIG previously published a final rule exempting CIG-16 from certain provisions of the Privacy Act under 5 U.S.C. 552a(k)(2) and (5) on June 10, 1992 (57 FR 24547). The OATSD(PCLT) now proposes to modify 32 CFR part 310 to update the existing Privacy Act exemption rule for CIG-16 to change the system name and to exempt portions of this system of records from certain provisions of the Privacy Act because information in this system of records may also fall within the scope of the following Privacy Act exemptions: 5 U.S.C. 552a(j)(2) and (k)(1). As referenced in the CIG-16 system of records notice published on May 31, 2022 (87 FR 32391), this rulemaking seeks public comment on (1) the previously claimed exemption under 5 U.S.C. 552a(j)(2) for which a rulemaking was not completed and (2) on the addition of an exemption under 5 U.S.C. 552a(k)(1). Additionally, this rulemaking seeks public comment on extending the exemptions claimed under 5 U.S.C. 552a(k)(2) and (5) to additional requirements of the Privacy Act, specifically, 5 U.S.C. 552a(e)(4)(I), which requires a description of the categories of sources of records in the system of records notice.

The DoD OIG proposes this exemption because some records may contain classified national security information, and as a result, notice, access, amendment, and disclosure (to include accounting for those records) to an individual, and certain recordkeeping requirements may cause damage to national security. The Privacy Act, pursuant to 5 U.S.C. 552a(k)(1), authorizes agencies to claim an exemption for systems of records that contain information

properly classified pursuant to Executive order. The DoD OIG is proposing to claim an exemption from several provisions of the Privacy Act, including various access, amendment, disclosure of accounting, and certain recordkeeping and notice requirements pursuant to 5 U.S.C. 552a(k)(1), to prevent disclosure of any information properly classified pursuant to Executive order, as implemented by DoD Instruction 5200.01 and DoD Manual 5200.01, Volumes 1 and 3.

The DoD OIG also proposes to exempt this system of records because these records support the conduct of criminal law enforcement activities, and certain requirements of the Privacy Act may interfere with the effective execution of these activities, and undermine good order and discipline. The Privacy Act, pursuant to 5 U.S.C. 552a(j)(2), authorizes agencies with a principal law enforcement function pertaining to the enforcement of criminal laws (including activities of prosecutors, courts, etc.) to claim an exemption for systems of records that contain information identifying criminal offenders and alleged offenders, information compiled for the purpose of criminal investigation, or reports compiled for the purpose of criminal law enforcement proceedings. Additionally, pursuant to 5 U.S.C. 552a(k)(2), agencies may exempt a system of records from certain provisions of the Privacy Act if it contains investigatory material compiled for law enforcement purposes, other than materials within the scope of 5 U.S.C. 552a(j)(2). The DoD OIG is proposing to claim exemptions from several provisions of the Privacy Act, including various access, amendment, disclosure of accounting, and certain recordkeeping and notice requirements, pursuant to 5 U.S.C. 552a(j)(2) and 552a(k)(2), to prevent the harms articulated in this rule from occurring.

Records in this system of records are only exempt from the Privacy Act to the extent the purposes underlying the exemption pertain to the record. A notice of a modified system of records for CIG-16 was published in the *Federal Register* on May 31, 2022 (87 FR 32391).

REGULATORY ANALYSIS

Executive Order 12866, “Regulatory Planning and Review” and Executive Order 13563,

“Improving Regulation and Regulatory Review”

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distribute impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. It has been determined that this rule is not a significant regulatory action under these executive orders.

Congressional Review Act (5 U.S.C. 804(2))

The Congressional Review Act, 5 U.S.C. 801 et seq., generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States.

DoD will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States. A major rule may take effect no earlier than 60 calendar days after Congress receives the rule report or the rule is published in the Federal Register, whichever is later. This rule is not a “major rule” as defined by 5 U.S.C. 804(2).

Section 202, Public Law 104-4, “Unfunded Mandates Reform Act”

Section 202(a) of the Unfunded Mandates Reform Act of 1995 (UMRA) (2 U.S.C. 1532(a)) requires agencies to assess anticipated costs and benefits before issuing any rule whose mandates may result in the expenditure by State, local, and tribal governments in the aggregate, or by the private sector, in any one year of \$100 million in 1995 dollars, updated annually for inflation. This rule will not mandate any requirements for State, local, or tribal governments, nor will it affect private sector costs.

Public Law 96-354, “Regulatory Flexibility Act” (5 U.S.C. 601 et seq.)

The ATSD(PCLT) has certified that this rule is not subject to the Regulatory Flexibility Act (5 U.S.C. 601 et seq.) because it would not, if promulgated, have a significant economic impact on a substantial number of small entities. This rule is concerned only with the administration of Privacy Act systems of records within the DoD. Therefore, the Regulatory Flexibility Act, as amended, does not require DoD to prepare a regulatory flexibility analysis.

Public Law 96-511, “Paperwork Reduction Act” (44 U.S.C. 3501 et seq.)

The Paperwork Reduction Act (PRA) (44 U.S.C. 3501 et seq.) was enacted to minimize the paperwork burden for individuals; small businesses; educational and nonprofit institutions; Federal contractors; State, local, and tribal governments; and other persons resulting from the collection of information by or for the Federal Government. The Act requires agencies obtain approval from the Office of Management and Budget before using identical questions to collect information from ten or more persons. This rule does not impose reporting or recordkeeping requirements on the public.

Executive Order 13132, “Federalism”

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a rule that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has federalism implications. This rule will not have a substantial effect on State and local governments.

Executive Order 13175, “Consultation and Coordination with Indian Tribal Governments”

Executive Order 13175 establishes certain requirements that an agency must meet when it promulgates a rule that imposes substantial direct compliance costs on one or more Indian tribes, preempts tribal law, or affects the distribution of power and responsibilities between the Federal government and Indian tribes. This rule will not have a substantial effect on Indian tribal governments.

List of Subjects in 32 CFR Part 310
Privacy.

Accordingly, 32 CFR part 310 is proposed to be amended as follows:

**PART 310 - PROTECTION OF PRIVACY AND ACCESS TO AND AMENDMENT OF
INDIVIDUAL RECORDS UNDER THE PRIVACY ACT OF 1974**

1. The authority citation for 32 CFR part 310 continues to read as follows:

Authority: 5 U.S.C. 552a.

2. Section 310.28 is amended by revising paragraph (c)(4) to read as follows:

§ 310.28 Office of the Inspector General (OIG) exemptions.

* * * * *

(c) * * *

(4) *System identifier and name.* CIG-16, Inspector General Administrative Investigation Records (IGAIR).

(i) *Exemptions.* This system of records is exempt from 5 U.S.C. 552a(c)(3) and (4); (d)(1), (2), (3), and (4); (e)(1); (e)(2); (e)(3); (e)(4)(G), (H), and (I); (e)(5); (e)(8); (f) and (g) of the Privacy Act pursuant to 5 U.S.C. 552a(j)(2). This system of records is exempt from 5 U.S.C. 552a(c)(3); (d)(1), (2), (3), and (4); (e)(1); (e)(4)(G) and (H); and (f) of the Privacy Act to the extent the records are subject to exemption pursuant to 5 U.S.C. 552a(k)(1), (k)(2), and (k)(5). This system of records is also exempt from 5 U.S.C. 552a(e)(4)(I) to the extent the records are subject to exemption pursuant to 5 U.S.C. 552a(k)(1).

(ii) *Authority.* 5 U.S.C. 552a(j)(2), (k)(1), (k)(2) and (k)(5).

(iii) *Exemption from the particular subsections.* Exemption from the particular subsections is justified for the following reasons:

(A) *Subsections (c)(3), (d)(1), and (d)(2)—(1) Exemption (j)(2).* Records in this system of records may contain investigatory material compiled for criminal law enforcement purposes to include information identifying criminal offenders and alleged offenders, information compiled for the purpose of criminal investigation, or reports compiled during criminal law enforcement proceedings. Application of exemption (j)(2) may be necessary because access to, amendment

of, or release of the accounting of disclosures of such records could inform the record subject of an investigation of the existence, nature, or scope of an actual or potential law enforcement or disciplinary investigation, and thereby seriously impede law enforcement or prosecutorial efforts by permitting the record subject and other persons to whom he might disclose the records to avoid criminal penalties or disciplinary measures; reveal confidential sources who might not have otherwise come forward to assist in an investigation and thereby hinder DoD's ability to obtain information from future confidential sources and result in an unwarranted invasion of the privacy of others.

(2) *Exemption (k)(1)*. Records in this system of records may contain information that is properly classified pursuant to executive order. Application of exemption (k)(1) may be necessary because access to and amendment of the records, or release of the accounting of disclosures for such records, could reveal classified information. Disclosure of classified records to an individual may cause damage to national security.

(3) *Exemption (k)(2)*. Records in this system of records may contain investigatory material compiled for law enforcement purposes other than material within the scope of 5 U.S.C. 552a(j)(2). Application of exemption (k)(2) may be necessary because access to, amendment of, or release of the accounting of disclosures of such records could: inform the record subject of an investigation of the existence, nature, or scope of an actual or potential law enforcement or disciplinary investigation, and thereby seriously impede law enforcement or prosecutorial efforts by permitting the record subject and other persons to whom he might disclose the records or the accounting of records to avoid criminal penalties, civil remedies, or disciplinary measures; interfere with a civil or administrative action or investigation which may impede those actions or investigations; reveal confidential sources who might not have otherwise come forward to assist in an investigation and thereby hinder DoD's ability to obtain information from future confidential sources; and result in an unwarranted invasion of the privacy of others.

(4) Exemption (k)(5). Records in this system of records may contain information concerning investigatory material compiled solely for determining suitability, eligibility, and qualifications for Federal civilian employment, military service, Federal contracts, or access to classified information. In some cases, such records may contain information pertaining to the identity of a source who furnished information to the Government under an express promise that the source's identity would be held in confidence (or prior to the effective date of the Privacy Act, under an implied promise). Application of exemption (k)(5) may be necessary because access to, amendment of, or release of the accounting of disclosures of such records could identify these confidential sources who might not have otherwise come forward to assist the Government; hinder the Government's ability to obtain information from future confidential sources; and result in an unwarranted invasion of the privacy of others. Amendment of such records could also impose a highly impracticable administrative burden by requiring investigations to be continuously reinvestigated.

(B) Subsection (c)(4), (d)(3) and (4). These subsections are inapplicable to the extent that an exemption is being claimed from subsections (d)(1) and (2). Accordingly, exemption from subsection (c)(4) is claimed pursuant to (j)(2) and exemptions from subsections (d)(3) and (d)(4) are claimed pursuant to (j)(2), (k)(1), (k)(2), and (k)(5).

(C) Subsection (e)(1). In the collection of information for investigatory and law enforcement purposes it is not always possible to conclusively determine the relevance and necessity of particular information in the early stages of the investigation or adjudication. In some instances, it will be only after the collected information is evaluated in light of other information that its relevance and necessity for effective investigation and adjudication can be assessed. Collection of such information permits more informed decision-making by the Department when making required disciplinary and prosecutorial determinations. Additionally, records within this system may be properly classified pursuant to executive order. Accordingly, application of exemptions (j)(2), (k)(1), (k)(2), and (k)(5) may be necessary.

(D) *Subsection (e)(2)*. To collect information from the subject individual could serve notice that he or she is the subject of a criminal investigation and thereby present a serious impediment to such investigations. Collection of information only from the individual accused of criminal activity or misconduct could also subvert discovery of relevant evidence and subvert the course of justice. Accordingly, application of exemption (j)(2) may be necessary.

(E) *Subsection (e)(3)*. To inform individuals as required by this subsection could reveal the existence of a criminal investigation and compromise investigative efforts. Accordingly, application of exemption (j)(2) may be necessary.

(F) *Subsection (e)(4)(G) and (H)*. These subsections are inapplicable to the extent exemption is claimed from subsections (d)(1) and (2).

(G) *Subsection (e)(4)(I)*. To the extent that this provision is construed to require more detailed disclosure than the broad, generic information currently published in the system notice, an exemption from this provision is necessary to protect the confidentiality of sources of information and to protect the privacy and physical safety of witnesses and informants. Accordingly, application of exemptions (j)(2) and (k)(1) may be necessary.

(H) *Subsection (e)(5)*. It is often impossible to determine in advance if investigatory records contained in this system are accurate, relevant, timely and complete, but, in the interests of effective law enforcement, it is necessary to retain this information to maintain an accurate record of the investigatory activity to preserve the integrity of the investigation and satisfy various Constitutional and evidentiary requirements, such as mandatory disclosure of potentially exculpatory information in the investigative file to a defendant. It is also necessary to retain this information to aid in establishing patterns of activity and provide investigative leads. With the passage of time, seemingly irrelevant or untimely information may acquire new significance as further investigation brings new details to light and the accuracy of such information can only be determined through judicial processes. Accordingly, application of exemption (j)(2) may be necessary.

(I) *Subsection (e)(8)*. To serve notice could give persons sufficient warning to evade investigative efforts. Accordingly, application of exemption (j)(2) may be necessary.

(J) *Subsection (f)*. The agency's rules are inapplicable to those portions of the system that are exempt. Accordingly, application of exemptions (j)(2), (k)(1), (k)(2) and (k)(5) may be necessary.

(K) *Subsection (g)*. This subsection is inapplicable to the extent that the system is exempt from other specific subsections of the Privacy Act. Accordingly, an exemption from subsection (g) is claimed pursuant to (j)(2).

(iv) *Exempt records from other systems*. In the course of carrying out the overall purpose for this system, exempt records from other systems of records may in turn become part of the records maintained in this system. To the extent that copies of exempt records from those other systems of records are maintained in this system, the DoD claims the same exemptions for the records from those other systems that are entered into this system, as claimed for the prior system(s) of which they are a part, provided the reason for the exemption remains valid and necessary.

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Dated: January 30, 2023.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

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